(13)

No. 83-2030

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY
OF OKLAHOMA CITY,
STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee,

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR CONSTITUTIONAL RIGHTS, THE NATIONAL LAWYERS GUILD, AND GAY FRIENDS & NEIGHBORS, INC. IN SUPPORT OF APPELLEE NATIONAL GAY TASK FORCE

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December 24, 1984

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INTEREST OF AMICI*

THE CENTER FOR CONSTITUTIONAL RIGHTS (CCR) is a non-profit legal and educational corporation founded in 1966, dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights. CCR has been involved in numerous cases challenging interference with first amendment rights, particularly where the government has sought to restrict the expression of unpopular opinions and ideas. See, e.g., United States v. United States District Court, 407 U.S. 297 (1972) (internal security wiretaps subject to warrant procedures); People v. Uplinger, 460 N.Y.S.2d 514 (N.Y. 1983), cert. dismissed as improvidently granted, __U.S.__, 104 S.Ct. 2332

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*The parties have given written consent to the filing of this brief amicus curiae; letters of consent have been filed with the Clerk of this Court.

(1984) (invalidating state law punishing public speech by gay people),

THE NATIONAL LAWYERS GUILD (NLG) is an organization of nearly 8,000 lawyers, law teachers, law students and legal workers. Since its inception in 1937, the NLG has worked consistently on behalf of groups seeking equality and social justice. Some NLG members are teachers who take part in public discussion and efforts to end discrimination against gay men and lesbians. They are harmed by statutes such as Okla. Stat. tit 70 § 6-103.15 which threaten them with job loss for exercising their first amendment rights of speech and association.

GAY FRIENDS AND NEIGHBORS, INC. (GFN) is an organization of approximately 400 gay men and lesbians in the New York area, including teachers in both public and private schools. GFN is representative of many grassroots organizations

throughout the country that provide the local lesbian and gay community with a place to discuss topics of common interest. Through outreach programs to the larger community it has established lesbians and gay men as a part of the diverse neighborhood in which its members live. These activities are impermissibly threatened by government restrictions which cut off communication about the rights of gay people and the realities of being gay.

SUMMARY OF ARGUMENT

The test of freedom of expression is the ability of this nation to tolerate startling ideas and stand up against campaigns of intolerance. Our history is a checkered one: early critics of government were punished under the Alien

and Sedition Laws, later ones, by the anti-Communist or anti-"subversive" laws and purges of the McCarthy period. Expression of heretical ideas was banned during the abolitionist period and again during the fundamentalist upsurge of the late nineteenth century. On the other hand, largely due to the timely intervention of the federal judiciary and this Court, some efforts to quash dissenters, such as opponents of the Vietnam War, have been cut short by vigorous enforcement of the first amendment.

School teachers have often been prime targets in campaigns against heterodoxy. But efforts--most particularly content-based ones--to deny teachers their rights as citizens and scholars to participate in advocacy and inquiry outside the school, as well as to engage in responsive discussion within, are

deadly to the central goals of education at every level.

> It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.

Wieman v. Updegraff, 344 U.S. 183, 196-97 (1952) (Frankfurter, J. concurring).

The Oklahoma statute which punishes and stigmatizes teachers for speaking on issues of homosexuality and gay rights is an old problem in new guise. It singles out non-condemnatory speech about homosexuality for proscription, although the issues such speech addresses are of great public importance. This prohibition does not implement any proper neutral rule of discipline in public or school

employment; rather, it acts only as a means to suppress a particular point of view.

The statute's negative impact on first amendment rights is effected both through singling out a special disfavored content and by relying on an impermissibly vague, as well as overbroad, statutory structure. The teacher is put at risk of losing her/his job simply because someone else has reported to the authorities that she/he said certain things. This triggering mechanism, in combination with the vague and open-ended nature of the disfavored speech, encourages reporting to school authorities of what teachers say off the job, in their capacity as citizens. The sweep of the statute's substantive prohibition is so broad as to encompass peaceful advocacy of civil rights and changes in the law, at the core of first

amendment protections. Because of its encouragement of informing, the statute even reaches to private discussions of public issues.

The statute clearly puts teachers at risk in a variety of settings. Seeking to avoid trouble resulting from the expression of their views, teachers will choose not to express them. The chill thus imposed by the statute also extends to the scholarly and professional activities of teachers, since it penalizes utterances in any context that might reflect the forbidden views on homosexuality.

None of the adverse consequences of the statute has any legitimate justification. On the contrary, the statute impoverishes the educational experience of children by silencing and intimidating their teachers. Instead of transmitting the importance of our constitutional

heritage, it denies and contradicts the fundamental constitutional and social values of open discussion, tolerance, and advocacy of change.

ARGUMENT

I. EFFORTS TO SUPPRESS TEACHERS' RIGHTS OF EXPRESSION HAVE A LONG AND DISCREDITED HISTORY

The various campaigns to stifle thought and protect orthodoxy in the U.S. shared certain characteristics. They have involved ideas which question the status quo and were experienced as deeply threatening to personal or political security or the hegemony of a particular moral code. They have sometimes emerged when the hated ideas had achieved the status of an issue of public importance. Sometimes they have served as a device to delegitimate advocacy on a broad range of social issues. Each campaign that has

not been quickly undercut by the courts silenced educators, distorted education and touched off ideological witch-hunts and vilifications. Each, in turn, has been repudiated when the dangers to freedom were finally recognized.

A. Anti-Slavery

The South responded to a series of slave insurrections in the 1830s by broad and sweeping attempts to control anything which might foster insurrections.[1] A prime candidate for such control was education, both of Blacks and whites. At root, however, this campaign was not directed simply at preventing uprisings,

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[1]For treatments of this period, see Nye, Fettered Freedom: Civil Liberties and the Slavery Controversy 1830-1860 (1963); W. Savage, The Controversy Over the Distribution of Abolition Literature 1830-1860 (1938); R. Hofstadter and W. Metzger, The Development of Academic Freedom in the U.S., 253-61 (1955).

but at teaching in "[e]very school and college in the South . . . that Slave Society is the common, natural, rightful, and normal state of society. . . ."[2] To this end, it was deemed necessary to forestall any mention or discussion of even the mildest criticism of slavery by teachers, in schools, or in textbooks.

Statutes were passed forbidding slaves or free Blacks to teach,[3] the distribution of anti-slavery literature,[4] or the questioning of a slave owner's

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[2]Richmond Enquirer, Aug. 29, 1856; cited in Nye, supra n. 1, at 90.

[3]E.g., 1832 Va. Acts § 1,20; Revised Statutes of North Carolina, 1836-37, p. 580, § 34 (cited in Savage, supra n. 1, at 5 n. 25).

[4]E.g., 1832 Va. Acts, § 7, 21; Statutes at Large of South Carolina, VII, 460 (Law of 1820, Section VI) (cited in Savage, supra n. 2 at 6 n. 28); on the statutory attempts to circumvent the intent of the federal Mails Law of 1836, see Nye, supra n. 1, at 80-81.

property right in his slaves.[5] Enforcement of these controls on the content and manner of expression was relatively simple in the lower schools "since these schools were closely controlled by the community they served." Nye, supra, n. 1, at 90. Control in colleges required greater vigilance, but "by 1840 . . . a rigorous regimentation of opinion [existed] concerning slavery and topics related to it." Id. at 91.[6] A University of Virginia professor noted in 1857 that "a funeral pall" had been drawn over rational discussion; critical views that had previously been openly expressed

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[5]E.g., 1835-36 Va. Acts § 44.

[6]E.g., Judge Nathan Green of Cumberland University (Tennessee), a slave owner, expressed antislavery views in his law class and was attacked as "a dangerous man to the South, not fit to instruct Southern youth." Nye, supra n. 1, at 96.

were now withheld or whispered in confidence. Hofstadter and Metzger, supra n. 1, at 256.[7]

Savage observes that the pall extended to written expressions as well.

> The South attempted to close every avenue through which objectionable literature might reach it. There was little fear of these books reaching slaves. . . . [T]he real fear was that [anti-slavery] doctrines would circulate among the whites in the South.[8]

Savage, supra n. 1, at 101.

In the North, the effort to forbid antislavery speech lost ground after

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[7]It is interesting to note, however, that even given the intensity of the campaign to silence anti-slavery speech, high state courts were sometimes reluctant to prohibit mere speech without direct incitement. Savage, supra n. 1, at 101-02, 113-17.

[8]Literature committees condemned leading texts in history and philosophy and The Southern Educational Journal announced a series of "revised" textbooks. Savage, supra n. 1, at 118-19; Nye, supra n. 1, at 96-97.

1840. Nonetheless, a distinction was usually made between those who "condemned slavery abstractly on moral grounds or proposed gradual or ultimate emancipation, and the 'immediate' abolitionists" Hofstadter and Metzger, supra n.1, at 259. A number of student abolitionist societies were suppressed and some anti-slavery faculty were pressed to resign, Nye, supra n.1, at 107-13, in order "to keep order, to avoid the agitation of an unpopular question." Id. at 113.[9]

Special hostility was shown to those who sought to educate Blacks. In 1833,

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[9]Thus, when a faculty and student abolitionist discussion group at Lane Seminary (Cincinnati, Ohio) began working with local Blacks to organize clubs and schools, the Board outlawed discussions which might "excite party animosities," forbade meetings, and outlawed public addresses. Forty students and two professors withdrew in protest. Nye, supra n.1, at 110-12.

Prudence Crandall admitted a Black girl to her girls' school, and announced her intention of opening a school exclusively for Black girls. Her home was attacked and she narrowly escaped physical violence. The legislature passed a law designed to prevent the opening of the school, by requiring that non-inhabitant Blacks could be admitted to Connecticut schools only by permission of the local selectmen. Crandall was arrested and imprisoned. 2 Dictionary of American Biography 503-04 (A. Johnson & D. Malone, 2d ed. 1958) She was convicted, but the conviction was reversed on appeal for insufficiency of the indictment. Crandall v. State of Connecticut, 10 Conn. 339 (1834).

This brief sketch indicates how fear of the effects of anti-slavery ideas led to attempts to control the range of their impact in Northern schools and to a broad

and sweeping attempt to control any contact with them in Southern schools.

> It led ultimately to a complete misunderstanding of the plantation system, and fostered intolerance of frank discussion of other problems connected with slavery.... By 1855 the South had lost all sense of proportion in regard to slavery, making claims for the system that few intelligent slaveholders thirty years earlier would have accepted as reasonable. Because Southern teachers and scholars had been denied their function for thirty years, the South could neither understand nor tolerate self criticism.
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> Nye, supra n. 1, at 100-01.

Not only the South suffered the loss. "The suppression of academic discussion was a token of a more general and more important suppression of thought and criticism that in the end took the entire subject [of abolition] out of the sphere of discussion and into the realm of force." Hofstadter and Metzger, supra n. 1, at 261.

B. McCarthyism

In the 1940s and 1950s, the intense scrutiny of beliefs produced by "anti-subversive" campaigns affected people in all walks of life, [10] but "nowhere [was] concern about subversive activities . . . more steadily manifest than in the educational process." Gellhorn, A General View, in The States and Subversion 375 (W. Gellhorn, ed. 1952) (hereinafter, "States and Subversion"). It was expressed in legislation in over 30 states requiring some form of "loyalty" oath by teachers;[11] state legislative

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[10] A partial listing of occupations affected was given by Justice Black in his concurrence in Speiser v. Randall, 357 U.S. 513, 531 (1958).

[11] D. Caute, The Great Fear 404 (1978). The unconstitutionality of these oaths was established in Baggett v. Bullitt, 377 U.S. 360 (1964), more than a decade after they had been instituted.

committees[12], and in actions by local school authorities.[13]

Official condemnation and suspicion of "subversion" called forth a vast array of informants, both amateur and professional, and engendered efforts to encourage or coerce reporting on other people in a wide variety of circumstances.[14]

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[12] Detailed histories of several such investigations are set forth in States and Subversion, supra p. 16.

[13] The New York City device of dismissing teachers who had invoked the fifth amendment in response to questions about their political views and associations was held unconstitutional in Slochower v. Bd. of Ed. of City of N.Y., 350 U.S. 551 (1956), six years after New York began firing teachers on that basis. Caute, supra n. 11, at 434. Slochower did not, however, result in the reinstatement of teachers fired for invoking the privilege. Id. at 439. Not until 1973 were pension rights restored to some of the teachers who had been fired. Id. at 442.

[14] V. Navasky, Naming Names, (1981), provides an in-depth study of the destructive effects of the system of

(Footnote Continued)

Professional informants were crucial to a number of investigations; many of them were later discredited. See Caute, supra n. 11, at 111-38; Harsha, Illinois in States and Subversion, supra p. 16, at 90-91 (role of professionals in investigation of University of Chicago and Roosevelt College); Countryman, Washington, in id. at 299-301 (role of professionals in investigation of University of Washington). No less important, and even more unpredictable, were private individuals who made occasional complaints about alleged subversive activities. Many of them were "likely to be trivial and irrelevant." Prendergast, Maryland, in id. at 168.[15]

(Footnote Continued)
reporting about the alleged ideas and associations of others.

[15]The particular prosecutor mentioned in this article carefully

(Footnote Continued)

The open-endedness of the official inquiries and their legitimation of any and all suspicions sanctioned extensive reporting efforts.

These concerted efforts had devastating effects on many individuals. Hundreds of teachers lost their jobs outright. Caute, supra n. 11 at 406. Many of them never returned to teaching and were barely able to survive financially. Id. at 551-56.

Several large public educational systems, notably New York, Philadelphia, and Los Angeles, as well as the University of California, were in turmoil for years as wave after wave of

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(Footnote Continued)
screened and dismissed such allegations. But reliance on the good will and good sense of prosecutors or legislative investigators was often insufficient protection. Cf. Baggett v. Bullitt, 377 U.S. at 373. See Sec. III. A., infra.

investigations and restrictions was imposed.[16] In New York City, the years from 1949 to 1956 saw numerous investigations, interrogations, firings, and resignations. There was even a period during which the Board of Education adopted a policy requiring teachers to "inform on their colleagues when commanded to do so by the Superintendent." Caute, supra n. 11, at 439-40. By the end of the decade, over 400 teachers had been fired, had resigned, or had been declared to be

[16]During a year of constant crisis in 1950-51 over the attempted imposition of a loyalty oath by the Regents of the University of California, 26 teachers were fired, 37 resigned in protest, and 47 refused appointments they were offered; 55 courses had to be cancelled. Caute, supra n. 11, at 422-24.

rehabilitated after intensive interrogation. Id. at 441.[17]

The investigations, interrogations, and sanctions had severe and lasting effects on many teachers who were not directly attacked, and on the profession as a whole. In 1955--as the worst was ending--the Columbia University Bureau of Applied Social Research conducted a national survey of college teachers of social science.[18] P. Lazarsfeld and W.

[17]The underlying statute, the "Feinberg Law," was declared unconstitutional in Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[18]The sample included both tenured and untenured teachers at public and private institutions. This does not, however, vitiate its application to the situation of public elementary and secondary schools. If anything, the respondents to the survey were in more secure positions, since many of them were not subject to local school authorities, and many of them were tenured. Cf. Shelton v. Tucker, 364 U.S. 479, 482 (1960) (absence of tenure system for teachers).

Thielens, Jr., The Academic Mind (1958). The survey showed that over one-third of the 2,451 respondents had noticed an increase in their colleagues' unwillingness, compared to six or seven years earlier, to express unpopular views in the community. Teachers were clearly concerned about the negative effects of exercising their rights as citizens. Id. at 195. Twenty percent of the respondents also reported that they noticed that their colleagues had become less willing to express unpopular political views in the classroom. Id.[19]

Not surprisingly, attacks on a few teachers had an in terrorem effect on

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[19]Since faculty members rarely sit in on each other's classes, this figure probably represents extremely obvious retrenchments, noticeable to someone not in close contact with the behavior. More subtle changes defy recording in this way.

many teachers. It is precisely this aspect of suppression of expression that undergirds the legal recognition of the chilling effects of such attacks, which lead people to "avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe." Baggett v. Bullitt, 377 U.S. at 372.[20] One aspect of this phenomenon is of particular interest here. The reported apprehension experienced by respondents in the Academic Mind study increased as they learned of more attacks on teachers in their area. Their apprehensive response

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[20]"Chill" is sometimes too mild a description. One New York teacher was threatened with discharge in 1949 because she asked for time to consult a lawyer before answering questions about her political associations in 1940 and 1941. The night after she was questioned, she committed suicide. Caute, supra n.11, at 433.

increased, however, independent of their own political views. Even teachers who had no reason to think that the content of their views would meet with disapproval nevertheless were made appreciably more nervous by content-based attacks on their colleagues. Id. at 257-60. In short, a concerted effort to silence teachers about major public issues affected virtually the entire political spectrum within the profession.

II. OKLA STAT. TIT. 70 §6-103.15 IS A CONTENT-BASED RESTRICTION ON SPEECH IN VIOLATION OF THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Oklahoma statute penalizes speech affirming or even examining the permissibility of homosexuality, if it is likely to come to the attention of a

school employee or student.[21] As a classic content-based regulation of speech, it reflects one of the most dangerous and destructive forms of

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[21] As the Tenth Circuit makes clear, the terms "advocating,... encouraging or promoting public or private homosexual activity" cannot be confined, as Appellants argue, to speech which urges the performance of homosexual sodomy still criminal in Oklahoma. See, NGTF v. Board of Education of the City of Oklahoma City, 729 F.2d 1270, 1273-74 (10th Cir. 1984). Compare Brandenberg v. Ohio, 395 U.S. 444,447 (1969). To advocate that homosexual sodomy be decriminalized "promotes," by undercutting the condemnation of homosexuality.

On the other hand the Brandenburg issues raised by the "soliciting" and "imposing" terms of the statute are not before the Court on this appeal. Under Brandenburg, 395 U.S. 444 (1969), adjudication of the constitutionality of these sections requires that the distinct questions of the constitutionality of Oklahoma's criminal homosexual sodomy law be considered. Though the Circuit left these provisions standing, it did not decide their validity. Since appellees did not cross-appeal the Circuit's failure to decide, the issue must await consideration in a separate case where the privacy issues are fully and squarely before the Court.

censorship which the first amendment was designed to prohibit:

> To permit the continued building of our politics and culture and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.'

Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972), quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964). Justice Powell struck the same chord in Healy v. James:

> The Court has previously determined that the State may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent... 'the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.'
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> 408 U.S. 169, 188 (1972) quoting

Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 137 (dissent).

The justification given for the content-based regulation of § 6-103.15 is that the forbidden non-hostile views of homosexuality may disrupt the school's functioning when co-employees or students learn that a teacher made these comments. A similar justification was rejected in Police Dept. v. Mosley, where the ordinance, allegedly aimed at preventing disruption in the schools, prohibited all picketing near schools during school hours, with the exception of labor picketing.[22] The goal of preventing

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[22] The view that Mosley is inapposite on the ground that it contains an absolute prohibition on other than labor picketing, whereas the Oklahoma statute purports to establish more particularized criteria for disruption,
(Footnote Continued)

disruption in the schools was obviously deemed valid but the content-based manner in which the state pursued that goal violated the first amendment and the equal protection clause of the fourteenth amendment.

By contrast, the general antinoise regulation in Grayned v. City of Rockford, 408 U.S. 104 (1972), was upheld because it was directed at the actual disruptive evil, noise, and no presumptions were made that particular thoughts were noisier than others. The statute here, however, is aimed at content, rather than at general, content-neutral evil, and is therefore impermissible. The very existence of

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(Footnote Continued)
is fallacious. The structure and presumptions of the statute operate just as effectively to eliminate an entire area of communications. See Sec. III, infra.

this special law directed at gay rights advocates denies them equal protection of the laws in relation to the exercise of their first amendment rights.

The state's disapproval or "undifferentiated fear or apprehension," Tinker v. Des Moines Indep. Com. Sch. Dist., 393 U.S. 503, 508 (1969), of non-condemnatory speech about homosexuality which may come to the attention of other school employees or students cannot be equated, as the statute does, with interference with legitimate school functions. "'Mere legislative preferences or beliefs...[are] insufficient to justify such [regulation] as diminishes the exercise of rights so vital to the maintenance of democratic institutions.'" Shelton v. Tucker, 364 U.S. at 489, quoting Schneider v. State, 308 U.S. 147, 161 (1939).

In Tinker, school officials could not prohibit "a particular expression of opinion" without demonstrating that it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." 393 U.S. at 509. Certainly broad restrictions on teacher expression outside the school must be justified by substantial disruption of school requirements as well. The Oklahoma statute requires none.

Instead the statute makes the presumptive equation of dislike of an idea with harm. The dissenting judge below expressed that view in his statement that a teacher who "advocates" or "encourages" homosexual behavior

> ...is in fact and in truth inciting school children to participate in the abominable and detestable crime against nature....There is no need to demonstrate that such conduct would bring about a material or substantial

> interference or disruption in the normal activities of the school.

(emphasis in original). NGTF v. Board of Education, 729 F.2d at 1276 (Barrett, J. dissenting.)

The disagreement that speech may likewise engender cannot suffice to establish the kind of disruption [23] or even prediction of disruption required to restrict the teacher from offering comments considered sympathetic to gay people in public discussions and debates. See Connick v. Meyers, ___U.S.___, 103 S.Ct. 1684, 1693 (1983); James v. Board of Education, 461 F.2d 566, 572 (2d Cir. 1972)(prediction of disruption from teacher expression within school cannot be based on disagreement about ideas expressed).

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[23] Justice Black's catalogue of such "disruptions"," 393 U.S. at 517-18, was rejected by the Tinker Court.

To insist that the first and fourteenth amendments protect the right of teachers to speak on this subject in numerous contexts outside the schools as well as informally within does not threaten, even on the broadest view, the legitimate power of school authorities to select on the basis of content among subjects and books. This statute--by operating against teachers in all contexts on the basis of explicit hostility toward or fear of the content of their speech--qualifies under the narrowest definition of "suppression of ideas," Board of Educ. of Island Trees v. Pico, 102 S.Ct. at 2835 (Rehnquist, J. dissenting). The policy of the Oklahoma statute is not only akin to "forbidding the criticism of United States policy...."

Id. at 2834.[24] It also exerts external control--beyond the confines of the school--to stifle participation in community activities and public debate on this single issue.

The cases involving public employees who speak out about their employer's policies or supervisors, either within the workplace or outside do not apply here. They do not involve content-based restrictions. Nor are they relevant to a statute restricting teacher speech outside the workplace on issues of public concern. However, even those cases make clear that public employers may not interfere with employee speech on matters of substantial public concern absent some demonstration that serious disruption of

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[24] See also Epperson v. Arkansas, 393 U.S. 97, 116 (1968) (Stewart, J. concurring).

legitimate workplace concerns is likely to occur. Pickering v. Board of Ed. of Tp. H.S. Dist., 391 U.S. 563 (1968).

In Connick v. Myers, 103 S.Ct. at 1692-93 (1983), substantial disruption was not required to uphold the firing of an assistant district attorney because the employee's speech "touch[ed] upon matters of public concern in only a most limited sense." Connick at 1693. Rather, the employee's speech, was viewed at heart as an employee complaint about internal office policies.

In sum, while the state has a right to determine the fitness of its teachers, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488.

III. OKLA. STAT. TIT. 70, §6-103.15 IS IMPERMISSIBLY VAGUE AND OVERBROAD.

A. The Statute Permits the Presumption that Mere Knowledge of a Teacher's Advocacy of Gay Rights Is Equivalent to Harm to the Operation of the School System.

The Tenth Circuit properly held that the factors to be considered under § 6-103.15(c) in determining unfitness do not save the statute from unconstitutionality. 729 F.2d at 1275. In addition to the reasons set forth by the Circuit, amici wish to emphasize that, in practice, the statute permits mere knowledge of teacher advocacy on the part of an employee or student to trigger the dismissal process. Accordingly, a teacher will easily fear that almost any mention of homosexuality or gay issues could come to the attention of the school authorities.

The vice of this statute thus is not only the fact that a teacher can be fired for unfitness because some expressional

activity relating to gay rights came to the attention of school children or personnel, but also that merely for making a non-condemnatory statement about homosex- uality, a teacher's fitness can be called into question. The law thus encourages the reporting of expressional activity that might otherwise remain unnoticed or insignificant, and, thereafter, sets into motion a process in which a teacher's integrity, morality, and beliefs are stigmatized and subject to inquisition.

The statute--in its procedural operation as well as its blanket censorial admonition--is reminiscent of the schemes devised during the McCarthy period to stifle protected expression of beliefs relating to social conditions and

social change.[25] This statute does not create a state apparatus for discovery and reporting of offending comments (compare Shelton v. Tucker, 364 U.S. 479, 480-81 (1960); Keyishian v. Board of Regents, 385 U.S. 589, 594 (1967)), but it encourages both crusading officials and private groups and individuals to broadly invade realms of protected association and expression. See Sec. I.B., supra.

Despite Appellant's attempt to make it appear so (Br. at 31), the so-called

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[25]One aspect of that process was stigmatizing people who expressed particular ideas or had particular associations by inferring, from the ideas and associations, membership in a disfavored group, e.g., the Communist Party. In this case, there is a similar attempt to equate protected advocacy of gay rights with the (presumed to be) disfavored status of being homosexual. See, e.g., Brief Amicus Curiae of Concerned Women for America Education and Legal Defense Foundation at 16-20.

"unfitness" or "nexus" factors in the statute do not in fact require any showing beyond the receipt of knowledge of the speech at issue. Not only is it not mandatory that an additional adverse effect be shown, but a school board convinced that homosexuality is malum in se is not foreclosed from treating knowledge alone as satisfying the adverse impact test, much as Judge Barrett's dissent suggests. 729 F.2d at 1276. Moreover, the proximity criteria (§ 6-103.15(c)(2)) could, as the amicus, Concerned Women for America Education and Legal Defense Foundation, implicity concedes, make actionable any statement made within the community in the last ten years. Brief at 14. The criteria of extenuating or aggravating circumstances detract nothing from the chilling effect. They would not exculpate the teacher who spoke out publicly. §6-103.15(c)(3).

Finally, § 6-103.15(c)(4) does not establish a test for permissible, albeit continuing statements; rather it creates a presumption that continuing statements are harmful per se.

The breadth of the statute is further expanded by allowing mere knowledge of a statement and impact on an adult school employee to trigger dismissal. Thus, if a school employee--deliberately or inadvertently--hears, witnesses, overhears, or receives a report about a co-worker's protected expression, and reports it to the superintendent, the teacher can be suspended or dismissed. Few teachers will be willing to take the risk of such inquiry and stigmatization.

Nor can it be assumed that either the school superintendant, who recommends dismissal in the first instance, or the local Board of Education, which approves

the action,[26] will exercise discretion under the statute to confine its application to circumstances that warrant it. Both the superintendant and the elected board are subject to local pressures to mount an anti-homosexual campaign where that seems desirable. As Justice White said in Baggett v. Bullitt, "well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." 377 U.S. at 373.

Thus the statute does not even require a minimal showing of harm. The potential for inhibition of protected conduct is thus sweeping; the potential for persecution--for reviving in a new guise the various "witch" trials that have marred our history--is enormous.

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[26] Okla. Stat. tit. 70, §§6-103.3 et seq.

But "first amendment freedoms need breathing space to survive..." Keyishian, 385 U.S. at 604. That breathing space is choked off under the Oklahoma statute.

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
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> Tinker v. Des Moines Independent Com.Sch.Dist., 393 U.S. at 508-09.

B. The Statute Operates Impermissibly To Chill Engagement By Teachers as Citizens in a Variety of Public Advocacy Contexts.

The Court has made clear that the teacher as citizen cannot be required by content-based regulation to forego the exercise of first amendment rights in the community outside the school as the price of keeping a job. See, e.g., Wieman v. Updegraff, 344 U.S. 183 (1952); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967). These cases establish the strong protection given to public school teachers when they exercise first amendment rights in the public sphere on matters of public concern.

The statute applies most obviously to advocacy in the public arena, including speaking, writing, testifying at legislative hearings, and attending meetings and demonstrations that support

the rights of lesbians and gay men.[27] This is precisely the kind of expression that is classically guaranteed to all citizens, including teachers, yet it is gravely endangered by the statute. See Keyishian v. Board of Regents, 385 U.S. 589 (1967); Pickering v. Bd. of Ed. of Tp. H.S. Dist., 391 U.S. 563 (1968).[28]

Because the statute can be triggered simply by a report of having heard a

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[27]Such advocacy issues are on the public agenda throughout the country. Decriminalization of private, consensual, adult homosexual acts; civil rights protection for lesbians and gay men and non-discrimination in public employment have been undertaken at all levels of government and are under active discussion in many areas.

[28]Far from being an example of disregard for law, as Appellant suggests (Br. at 34), the advocacy prohibited in this case is almost exclusively that which seeks change and acceptance of gay rights through constitutionally protected channels or petition for redress. See Baggett v. Bullitt, 377 U.S. at 368; Cramp v. Bd. of Public Instruction, 386 U.S., 278, 286 (1961).

teacher say certain things, it reaches discussions of homosexuality in a wide variety of semi-public yet protected associational contexts. Whether or not discrimination against lesbians and gay men should be prohibited is the topic of discussion in churches and church-related groups, in unions, in political parties, in medical, psychiatric, psychological and social work organizations. See generally, Amicus Curiae Brief on Behalf of the Appellee by Lambda Legal Defense and Education Fund. An advocate of gay rights might wish to join a gay rights organization or subscribe to journals which advocate or discuss gay rights. See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958); Shelton v. Tucker, 364 U.S. 479 (1960). Any of these activities, if publicized or reported to school authorities, could enmesh a teacher in the statutory process.

The statute also presents a substantial risk of exposure even from more private informal gatherings and social occasions. A restaurant conversation erupts into a heated debate about gay rights; a serious discussion is overheard by the occupants of a neighboring booth. In the face of these risks, caution and silence may govern.

In Keyishian v. Board of Regents, 385 U.S. 589 (1967), state laws and regulations permitting the dismissal of public school teachers for pure speech were struck down. The vague and potentially overbroad scope of the banned speech and the investigatory machinery created to ferret it out for examination were deemed by the Court to constitute a method of terrorizing teachers so as to constrict their expression of political ideas.

> It would be a bold teacher who would not stay as far as possible from

> utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in 'those who believe the written law means what it says.'

Keyishian, 385 U.S. at 601, quoting Baggett v. Bullitt, 377 U.S. at 374.

Indeed the Court has repeatedly stressed the importance of preserving such freedom in light of the particular and important role played by teachers in society:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.... But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, in the case of teachers brings the safeguards of those amendments vividly into operation.

Wieman v. Updegraff, 344 U.S. 183, 195 (1958) (Frankfurter, J. concurring).

Faced with the "threat of dismissal from public employment" which is "a

potent means of inhibiting speech", Pickering, 391 U.S. at 574, a group of generally well educated adults with knowledge of children's development will not dare to share their ideas in the world at large.[29] The state of Oklahoma has set forth no substantiated justification for this sweeping result. Rather, the statute is a prime example of the "government as educator...seek[ing] to reach beyond the confines of the school." Bd. of Ed.,Island Trees v. Pico, 102 S.Ct. at 2833 (Powell, J., dissenting.)

C. The Statute Impermissibly Chills Teachers' Engagement In Scholarly Pursuits Essential To Their Educational Mission.

The statute's impact on teachers' ability to maintain or improve their

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[29]The harm to the world outside the school is great. For that world, "the spectrum of available knowledge" will be contracted. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

competence through professional activities outside of the school building is sharp and deleterious. An understanding of homosexuality can be essential to understanding literature, interpreting and applying the social sciences, or illuminating history. Many teachers read current scholarship in their fields and discuss it with their colleagues. Many teachers take advanced courses, both to aid in their work and to prepare themselves for advancement in their jobs. Is a copy of an article or book on homosexuality impermissible "promotion"? Cf. Keyishian, 385 U.S. at 599 (carrying a copy of the Communist Manifesto on a public street). This statute truncates full participation in these activities, and in some situations makes any participation impossible.

A particularly clear example is the situation of high school teachers of

literature.[30] A teacher who wants to explore dispassionately the life and works of widely anthologized authors runs a serious risk of falling afoul of the statute. The works of Walt Whitman,[31] Willa Cather,[32] E. M. Forster,[33] W. H.

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[30]This is by no means the only example. Teachers of U.S. history may want to learn more about Eleanor Roosevelt. See D. Faber, The Life of Lorena Hickock, E.R.'s Friend (1980). Teachers of French language and literature may want to deepen their understanding of Verlaine, see Schmidt, Visions of Violence: Rimbaud and Verlaine, in Homosexualities and French Literature 228-42 (G. Stambolian and E. Marks, eds. 1979). Teachers of world history and philosophy may want to understand classical Greek culture and social relations. See Plato, The Symposium (W. Hamilton trans. 1951); K. Dover, Greek Homosexuality (1978). Any teacher may want to take courses in women's studies, psychology, sociology, or the history of sexuality.

[31]See R. Martin, The Homosexual Tradition in American Poetry 3-89 (1979); P. Zweig, Walt Whitman: The Making of the Poet (1984).

[32]See O'Brien, "The Thing Not
(Footnote Continued)

Auden,[34] and Virginia Woolf[35] have been taught for years to students throughout the U.S.[36] Must a teacher fear that

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(Footnote Continued)
Named": Willa Cather as a Lesbian Writer, 9 Signs 576 (1984); P. Robinson, Willa: The Life of Willa Cather (1983).

[33] See C. Summers, E. M. Forster, (1983). Forster, whose novel A Passage to India is widely read, is also the author of Maurice (Macmillan edition 1971), a novel with an explicitly homosexual theme.

[34] See H. Carpenter, W. H. Auden (1981); D. Farnan, Auden in Love (1984).

[35] See Q. Bell, Virginia Woolf (1972); L. DeSalvo, Lighting the Cave: The Relationship between Vita Sackville-West and Virginia Woolf, 8 Signs 195 (1982).

[36] For example, C. Craig and F. Rice, English Literature (Ginn Literature Series) (1964) contains works by Woolf, Forster, and Auden. J. Early, et al, Adventures in American Literature, Classic Edition (Adventures in Literature Series) (1968) includes Whitman, Cather, and Auden. Carlsen, et al, American Literature (McGraw-Hill Literature Series) (1984) contains Whitman and Cather. Carlsen, et al, British and Western Literature (McGraw-Hill Literature Series) (1984) collects
(Footnote Continued)

discussing homosexuality and great authors in the same breath would be construed to violate the statute? The statute clearly endangers a teacher's ability to discuss--in any context--any scholarly work that draws a positive connection between an author's work and her or his homosexuality. See, e.g., DeSalvo, supra n. 35, Martin, supra n. 31. It therefore makes it impossible for teachers to think openly and effectively. "It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and encourage." Wieman v.

(Footnote Continued)
Forster, Woolf, and Auden. Editions of Adventures in American Literature and both McGraw-Hill books are approved for use in Oklahoma schools.

Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J. concurring).[37]

Finally, although the statute is aimed primarily at speech outside the school, it also muzzles the teacher's ability to discuss or respond to issues of homosexuality as they may be raised by the curriculum or by the students themselves. Just as this Court in Keyishian, 385 U.S. at 600, implicitly criticized the Feinberg Law for deterring a teacher from informing a class about the precepts of Marxism, here the statute chills a teacher from even mentioning the existence of homosexuality, its relevance to the subject under study, or particular views that it is an acceptable life style. See also Epperson v. Arkansas, 393

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[37]See also, H. McFarland, Psychological Theory and Educational Practice 201 (1971).

U.S. 97, 116 (1968) (Stewart, J. concurring in the result).

The Oklahoma statute constrains discussion by alerting colleagues and students to look for every allegedly homosexual nuance in presentation.[38] Thus, the statute encourages the hearer to participate in "a system which searches for hidden meanings in a teacher's utterances," Adler v. Board of Education of City of New York, 342 U.S. 485, 510 (1952) (Douglas, J. dissenting), and the speaker to "steer far wider of the unlawful zone," Speiser v. Randall,

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[38]The analogues to the McCarthy era are not far to seek. "One historian gave a reading assignment on the constitution of the Soviet Union, 'only to find that the mere fact that I said they had a constitution made the students think that I was a Commie.'" Lazarsfeld and Thielens, supra p. 16, at 197. Teachers in the survey reported a wide range of negative effects on their professional functioning, both in class and outside. Id. at 197-213.

357 U.S. 513, 526 (1958). For example: What was the significance of the history teacher's comments about the breadth of John Maynard Keynes's interests, as illustrated both by his marriage to a Russian ballerina, Lydia Lopokova, and his long relationship with an English painter, Duncan Grant?[39] Why did the mathematics teacher talk at length about Alan Turing, who developed the idea on which modern computers are based?[40]

In addition, the statute makes it impossible for a trusted instructor or guidance counselor[41] to respond

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[39]See L. Edel, Bloomsbury: A House of Lions 145-47 (1979); C. Hession, John Maynard Keynes (1984).

[40]See A. Hodges, Alan Turing: The Enigma (1983).

[41]The statute incorporates by reference the definition of "teacher" found at Okla. Stat. tit. 70, §1-116 (1982): "Any person who is employed to

(Footnote Continued)

evenhandedly or perhaps even at all to student requests for counseling in regard to issues of homosexuality that arise for members of their family, friends, or for themselves.

These are only some examples of the potential scope of a law which singles out content-based expression for potential punishment. Indeed, the statute reflects an effort, reminiscent of the prohibitions on discussions of slavery, to hermetically seal the public schools from exposure to legitimate protected expression about an issue of major public importance. The effort is futile, since the issue is important in public debate and participation of students in gay rights advocacy in and outside the

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(Footnote Continued)
serve as district superintendent, county superintendent, principal, supervisor, counselor, librarian, school nurse or classroom teacher..."

schools is both common and protected.[42] Yet the statute is nonetheless dangerous to the fundamental values of the First Amendment. By denying to teachers the freedom to say anything in any context

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[42] On numerous occasions, the courts have upheld the constitutional rights of gay student organizations denied official recognition by their universities. See, e.g., G.A.A. v. Bd. of Regents, 638 P.2d 1116 (Okla. 1981); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); Gay Lib v. Univ. of Missouri, 558 F.2d 848 (8th Cir. 1977), cert. denied sub nom. Ratchford v. Gay Lib, 434 U.S. 1080 (1978); Gay Student Services v. Texas A&M Univ. 737 F.2d 1317 (5th Cir. 1984). In each of these cases, it was held that the policies and purposes of the student organization did not "'infringe reasonable campus rules, interrupt classes or substantially interfere with the opportunity of other students to obtain an education,'" Gay Lib v. Univ. of Missouri, 558 F.2d at 856 quoting Healy v. James, 408 U.S. 169, 189 (1972).

In Fricke v. Lynch, 491 F.Supp. 381 (D.R.I. 1980), the court overturned a high school principal's decision not to allow a student to escort his male lover to the senior prom. The Court rejected as a basis for exclusion the principal's asserted fear of a violent reaction from other students.

that might come to the attention of school children or personnel, if it does not condemn homosexuality and the gay rights movement, the state denies teachers the right to express their commitments to social change and scholarship outside the classroom, just as it denies students the right to a non-distorted, non-intimidating education.

IV. THE STATUTE'S OFFICIAL CONDEMNATION OF PARTICULAR BELIEFS, FAR FROM FURTHERING LEGITIMATE GOALS, UNDERMINES IMPORTANT CONSTITUTIONAL AND EDUCATIONAL VALUES

The mechanism by which this statute operates may be more subtle but is no less deadly to free discussion that the loyalty oaths and mandatory investigations struck down by this Court in the "subversive" teacher cases. By penalizing expression of views opposing a particular bias, it in effect sanctions

the biased position. Fear and outrage at homosexuality and the gay rights movement are volatile and dangerous, given their roots in religion and the conviction of moralistic truths.[43] The same fervor that attended the anti-communist witchhunts can be incited as to homosexuality.[44] Thus speech that might be unknown or disregarded or, at most, the subject of interested or even hostile comment, can explode into a major controversy about the fitness of a previously impeccable teacher. Difference of opinion, even disgust, can be transformed into unnecessarily disruptive confrontation.

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[43] See, e.g., the dissenting opinion below, 729 F.2d at 1276; Brief of the State of Oklahoma Amicus Curiae, at 22.

[44] High schools are not immune. See, e.g., National Klan Leader Terms City Youth Recruiting Good, Okla. City Times, (Footnote Continued)

In short, the statute teaches intolerance, because the perception of official tolerance for or encouragement of intolerant behavior can have a powerful effect. A substantial literature suggests that indications of official resistance to court-ordered school desegregation remedies encouraged hostile, and sometimes violent, community reactions to the desegregation process. C. Willie and S. Greenblatt, Community Politics and Educational Change 324-28, 331 (1981); T. Pettigrew, Racially Separate or Together? 130 (1971). Reduction in hostility seems not to require officials to go out of their way to endorse the desegregation process, but

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(Footnote Continued)
Jan. 26, 1978, at 1, col. 1, reporting on anti-gay organizing by the Ku Klux Klan in Oklahoma high schools.

merely to uphold normal legal processes. Willie and Greenblatt at 324.

This Court has noted that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, ___ U.S. ___, 104 S.Ct. 1879, 1882 (1984).[45] Indeed, the central wisdom of the First Amendment is that:

> [s]peech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

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[45] Palmore dealt with racial prejudice. Court around the country have applied the same principle in cases where societal prejudice against lesbian mothers was advanced as a reason to remove children from their custody. See, e.g., M.P. v. S.P., 169 N.Super. 425, 404 A.2d 1256, 1263 (N.J. Super. 1979)(if children remain with mother, despite societal prejudice, they may "emerge better equipped to search out their own standards of right and wrong, better able to see that the majority is not always correct in its moral judgments....").

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). The Oklahoma statute defies this basic constitutional principle. Moreover, it undermines the importance of the Constitution at a crucial point in the training of citizens. The fact that local public schools

> are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 637 (1943).

Should we subject our children to the spectre of hatred and intolerance or plant the seeds for tolerance and freedom of spirit? The most fundamental aspirations of the first amendment demand that we cast our lot with the tasks of tolerance and the free play of ideas. The bleaker experiences of this nation

confirm that this is the only safe course.

> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

CONCLUSION

For the foregoing reasons, this Court should enforce the first amendment and affirm the judgment of the court below.

Respectfully submitted,

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